

RESERVATION IN HIGHER JUDICIARY A LEVEL PLAYING FIELD FOR UNDERREPRESENTED COMMUNITIES

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Introduction

One of the three pillars of Democracy, the Judiciary serves as the protector of Constitution, it safeguards people from capricious acts of both Executive and Legislature, and does the interpreting work of the laws formulated by the Legislature, also struck the arbitrary acts done by the Executive. Intrinsically, being a Justice granting institution, Judiciary should be free from all kind of interferences that too precisely from the other two organs of the government.

In *Kesavananda Bharathi vs State of Kerala 1973* the Supreme Court of India had propounded Basic structure Doctrine in which it categorically stated that the Parliament cannot destroy or alter the basic features of the Constitution, One of the basic feature is the Independence of Judiciary. In a Democracy it is paramount that the judiciary must be impartial and free from external pressures, then only people will have faith in the Legal system. Such influences is mainly by way of Politicians, other Judges, media etc. one of the fundamentals of Independence of Judiciary is the appointment of Judges in a free and fair manner. Currently in India Judges of higher Judiciary are appointed by the President on consultation with the Supreme court as stated under article 124(2) of the Constitution under the collegiums system, Supreme Court judges are essentially appointed by a “collegiums” consisting of the Chief Justice of India and the four most senior judges of the Supreme Court. Where as in the appointment to that of High Courts Chief Justice of the respective High court will be included in the collegiums.

Several Constitutional experts had commented about the selection process existing in appointment of Judges in higher Judiciary, this includes veterans like Justice Krishna Iyer and Dr. B.R. Ambedkar, in the words of Krishna Iyer: “There is no structure to hear the public in the process of selection. No principle is laid down, no investigation is made, and a sort of anarchy prevails.”²⁹⁰ Dr. B.R. Ambedkar warned against the system of judges selecting judges by saying that “to allow the Chief Justice practically a veto upon the appointment of judges is

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²⁹⁰ “Justice in judicial appointments” the Hindu -opinion page January 18, 2014

really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day”²⁹¹.

If we look at the Judges who were appointed for the last fifty years in High courts and Supreme court, most of them would either have some Political affiliation or Dynasty relation to that of former Judges, and still we could see Upper Caste Hindu’s who are dominating in large numbers in Higher Judiciary for a long period, if this is the case then how could these persons from Judicial fraternity will be in a position to understand the oppressed groups problem. To sought out this Anomaly, People from Backward communities should represent in humungous numbers in High courts and Supreme court. One of the best ways to make this happen is to bring the Reservation system in Higher Judiciary comprising of SCS STS OBCS and Minorities.

For a long period, people from backward communities have been discriminated and oppressed, this resulted in this group suffering from Social Economic and Educational Backwardness. To attain Social equality and to bring them at par with the so called affluent group, Reservation system was introduced, in Admission to Educational Institutions and entry in Public Employment for ST SC and OBCS, this Affirmative action programmed aimed at bringing Social equity, and thus far it is Successfully going, but this should continue for some more decade to achieve the exact Equality.

Judiciary being one of the three branches of government is the one area where Reservation is not followed, some people believe judiciary will not come under the definition of State as stated under Article 12 of the Constitution, so that it will not cover up article 16(4) which is Reservation in Public employment, this article will look in to the Constitutional provisions and try to bring in the Indispensable understanding about Reservations, and how far Higher Judiciary can be brought under the purview of Reservation.

Objectives of the study

This paper is confined precisely with certain provision in the Constitution that is article 12 which is definition of State, article 15 (4) the state can make special provision for the advancement of socially and educationally backward classes of citizen and for schedule caste and schedule tribes, article 16(4) state can make provisions on reservation in appointment or post in favour of backward classes of citizens who are not adequately represented in the

²⁹¹ “Justice in judicial appointments” the Hindu -opinion page January 18, 2014

services of the state, and finally article 335 which talks about Administrative efficiency. Researcher will try to find proper legal reasons that could bring in Reservation in Higher Judiciary. With the above backdrop the following objectives are framed.

1. To analyze whether the definition of State includes Higher Judiciary as stated under article 12 of the Constitution. And To describe the linkages between article 15(4) and 16(4) with that of article 12 of the Constitution
2. To critically evaluate article 335 of the Constitution, and ascertain whether Administrative efficiency will be a concern in bringing Reservation in higher Judiciary.

Definition of State and the position of Judiciary

The word State used in the Constitution has different meanings, as far as article 12 is concerned, it will cover up part III which is fundamental rights chapter. By the express terms of Article 12, the expression "the State" includes (i)the Government of India (ii)Parliament of India (iii)the Government of each of the States which constitute the Union of India (iv)the Legislature of each of the States which constitute the Union of India (v)all local authorities within the territory of India (vi)all local authorities under the control of the Government of India (vii)all other authorities within the territory of India and (viii) all other authorities under the control of the Government of India.

Actually, several times Court had dealt with the interpretation of the expansion of the word State under Article 12, which includes Parliament, state legislature, local self government, Local authorities, Government aided Institutions, etc. whereas Judiciary is concerned, it should be seen how come the revenue is raised for its functioning. it is taken none other from, the Consolidated fund of India like every government institution or government aided institutions. But bizarrely, Judiciary was the only organ which have been excluded when ever in interpreting the term state under article 12 of the constitution. In several occasions, Supreme Court had given wider interpretations for the term Other Authorities under article 12, but it had erroneously left out Judiciary from the ambit of other authorities.

Moreover if any ambiguity arises when ever interpreting the words in the Constitution, the best solution to this crisis is going through Constitutional Assembly Debates, with respect to Art. 12, and in particular, the meaning of the phrase 'other authorities' were raised. It was suggested that leaving judicial bodies out of the purview of Art. 12 may lead to the conclusion that "even a Magistrate... might pass an order, or make a notification abridging the rights that are

conferred under sub-clause (a) of clause (1) of article 13.”²⁹² [Constituent Assembly Debates, Vol. VII, p. 609 (1950)]. In response to this concern, Dr. B. R. Ambedkar clarified that “authority” for the purposes of Art. 12 subsumed within its scope “every authority which has got either power to make laws or the power to have discretion vested in it”²⁹³ [Constituent Assembly Debates, Vol. VII, p. 610 (1950)]. It is indisputable that courts fall within the purview of the latter category.

In furtherance to the above arguments, Supreme court had several times taken the view that State Under article 12 comprise Judiciary too,

In his dissenting judgment in *Naresh vs State of Maharashtra* (1966(3) SCR 744) Hidayatulla J took the view “I think rightly that the judiciary is also ”State” within the definition of the word ”State” in Article 12 of the Constitution, The word "State" in Arts. 12 and 13 includes "Courts" because. Otherwise courts will be enabled to make rules which take away or abridge fundamental rights. And a judicial decision based on such a rule would also offend fundamental rights. A Judge ordinarily decides controversies between the parties, in which controversies he does not figure, but occasion may arise collaterally where the matter may be between the Judge and the fundamental rights of any Person by reason of the Judge's action”²⁹⁴.

Hon’ble Justice, Mathew in *Kesavanand Bharati’s* case held at page 830 (1973 Supp. SCR1)”The definition of the word”State’ both for the purpose of Part III and Part IV is the same. all the directives from articles 38 to 51 of our Constitution are addressed to the ’State’ as defined in Article 12. Which clearly states judicial process is also”State Action”²⁹⁵.

Apparently, there is no dubious reason not to include Higher Judiciary in the realm of the definition of State under Article 12, In such a case Article 15(4), 16(4) and 16(4a) will automatically supports Reservation in Higher Judiciary.

Administrative Efficiency and Reservation in Judiciary

The claims of SCs and STs to the Services and posts in the State should be considered in consistent with the maintenance of administrative efficiency is what the Constitution

²⁹² Constituent Assembly Debates, Vol. VII, p. 609 (1950)

²⁹³ Constituent Assembly Debates, Vol. VII, p. 610 (1950)

²⁹⁴ “*Naresh vs State of Maharashtra*” (3) SCR 744) 1966

²⁹⁵ “*Kesavananda Bharati vs State Of Kerala*” AIR 1973 SC 1461

articulates, but time in again this provision is wrongly understood, Whenever there is any claim of Reservation in topmost administrative posts, in the name of Administrative efficiency they are rejected, if we look in to the provision, it clearly states the claims of STs and STs should be taken in to Consideration, which doesn't mean they should be completely left out, and by questioning the competence of a particular caste group, is nothing but degrading and disrespecting the values enshrined in our Constitution which is to attain Equality.

Out of a billion people living in our country, the OBCs SCs STs and Minorities put together more than ninety five percent of Population, with this much population, it is unacceptable to say that there is lesser Efficiency possessed by these groups. Currently, out of twenty one High courts and the one and only Supreme Court, have meager number of Judges representing from so called backward groups. All they want is at least fifty percent Reservation of representation in Higher Judiciary, so that they can get Justice in a rightful mode.

Conclusion

During the last decade, there were two committee set up to give recommendation on this issue, Committee authored by Sh. Kariya Munda, MP, as Chairman of the Committee, which was presented to the Lok Sabha as far back as on 15.03.2000, provides sufficient basis for the amendment of the constitution to effect reservation for SCSTs in the judiciary of High Courts & Supreme Court. Recently E.M.Sudarsana Natchiappan Committee has also considered the issue in depth and has categorically recommended reservation in favour of SC, ST& OBCs in higher judiciary. And the latest being the Honorable Chief Justice P.Sathasivam, he expressed his views on having Reservation in Higher Judiciary. It is high time, to bring Reservation in Higher Judiciary without any further delay. we are in the era of talking about bringing reservations in Private sectors, and the State cannot able to include one of its own organ which is Judiciary under the ambit of Reservation.

Recommendations

1. There should be a Constitutional amendment under Article 12 which must include Judiciary within the definition of State, in addition to that, Amendment under article 16(4) should add "Reservation in Higher Judiciary". Some would perhaps argue that, the said Constitutional amendment would be against Basic Structure Doctrine (Independence of Judiciary) but I robustly believe, Administration of Justice is entirely different from Appointment of Judges.

2. an All India Judicial Service Commission ought to be created and one renowned Supreme Court Advocate each from SC ST OBC and Minorities should be the members of the Commission, along with the Chief Justice and two other Judges of Supreme court, the Commission will conduct exams and interviews for the appointment to High court Judges only, by way of promotion, these High court judges will end up as Supreme Court judges. And most importantly the Commission should follow the policy of Reservation.

